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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 MERCY AMBAT, ET AL.,

No. C 07-3622 SI

9 Plaintiffs,

10 v.

**ORDER GRANTING DEFENDANTS'
MOTION TO STAY PENDING
RESOLUTION OF STATE COURT
PROCEEDING**

11 CITY AND COUNTY OF SAN FRANCISCO,
ET AL.,

12 Defendants.
13 _____/

14 On October 19, 2007, the Court heard argument on defendants' motion to dismiss or stay
15 pending resolution of an overlapping state court proceeding. Having considered the arguments of
16 counsel and the papers submitted, the Court hereby GRANTS defendants' motion to STAY pending the
17 resolution of the state court action.
18

19 **BACKGROUND**

20 On February 20, 2007, seven deputy sheriffs of the County of San Francisco, along with the San
21 Francisco Deputy Sheriff's Association ("SFDSA"), filed a putative class-action complaint in San
22 Francisco Superior Court alleging gender discrimination against the City, Sheriff Michael Hennessey,
23 and Undersheriff Jan Dempsey. The complaint asserted two causes of action, one alleging violations
24 of the California Fair Employment and Housing Act ("FEHA") and the second alleging violations of
25 California Penal Code § 4021.¹ The class action suit arose from defendants' reorganization of the San
26 _____

27 ¹California Penal Code § 4021 provides in relevant part:

28 (b) It shall be unlawful for any officer, station officer, jailer, or custodial
personnel to search the person of any prisoner of the opposite sex, or to
enter into the room or cell occupied by any prisoner of the opposite sex,

1 Francisco County Jail system, which involved reassigning all female inmates from various county jails
2 to one central location housed in County Jail #8. Along with this reorganization, defendants instituted
3 a new staffing policy that permits only female deputies to work in the female pods of County Jail #8.
4 The new policy also creates a gender-based two-tiered process for selecting days off by which a female
5 deputy with less seniority than a male deputy may receive preference in selecting days off because her
6 seniority is only compared to that of other female deputies.

7 The state plaintiffs alleged the policy discriminates against female deputies because it prevents
8 them from gaining the training and experience necessary to receive promotions and further their careers
9 in law enforcement, as well as forces them to work overtime. The policy allegedly discriminates against
10 male deputies because it prevents them from gaining the training and experience that comes with
11 working in female pods and it also prevents them from signing up for working overtime in the female
12 pods. The plaintiffs also alleged that the policy discriminates against both genders because they must
13 work less desirable shifts and schedules since the gender-based two-tiered system limits deputies' right
14 to choose regular days off. The complaint seeks compensatory damages, punitive damages, attorney
15 fees, injunctive relief, and costs of suit.

16 The plaintiffs in the state case filed a First Amended Complaint on or about March 15, 2007.
17 Subsequently, the City filed a demurrer, the parties began discovery, and they participated in a Case
18 Management Conference. On October 4, 2007, the City's demurrer was sustained and the Superior
19 Court granted leave to amend the FEHA cause of action. On October 16, 2007, the plaintiffs filed a
20 Second Amended Complaint that folded their allegations regarding violations of California Penal Code
21 § 4021 into one cause of action under the FEHA.²

22 Five months after the filing of the state complaint, on July 13, 2007, the thirty-five plaintiffs
23 here, seven of whom were originally named as plaintiffs in the state action, filed this federal action.

24
25 except in the company of an employee of the same sex as the prisoner.
26 *Except as provided herein, the provisions of this subdivision shall not be*
27 *applied to discriminate against any employee by prohibiting appointment*
or work assignment on the basis of the sex of the employee. (Emphasis
28 *added).*

²The Court grants defendants' supplemental request for judicial notice in support of their motion.

1 Plaintiffs, both male and female deputy sheriffs, bring nine causes of action arising under Title VII,
 2 FEHA, the California Labor Code, and the California Peace Officer Bill of Rights. Similar to the state
 3 case, plaintiffs allege suffering general damages and emotional distress due to the new staffing policy.
 4 Unlike the state complaint, however, plaintiffs here allege three individual complaints of retaliation.
 5 Plaintiffs seek similar relief as sought by the plaintiffs in the state complaint.

6 Originally, the law firm of Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer
 7 represented all plaintiffs in the state action, both the seven named plaintiffs and the SFDSA. On June
 8 22, 2007, however, Lawrence D. Murry substituted in as counsel to represent the seven individual
 9 plaintiffs in the state action. He then filed this federal action where he represents the thirty-five
 10 individual plaintiffs. On September 14, 2007, two months after filing this federal action and two weeks
 11 after defendants brought this motion to dismiss or stay pending resolution of the state court proceeding,
 12 plaintiffs' counsel filed, and was granted, a request with the state court to dismiss without prejudice the
 13 seven named plaintiffs in the state action, leaving only the SFDSA as the named plaintiff in the state
 14 court class action.

16 LEGAL STANDARD

17 A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of
 18 subject matter jurisdiction may either "attack the allegations of the complaint or may be made as a
 19 'speaking motion' attacking the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co.*
 20 *v. Gen. Tel. and Elec.*, 594 F.2d 730, 733 (9th Cir. 1979) (citing *Land v. Dollars*, 330 U.S. 731, 735 n.
 21 4. (1947)). Where the jurisdictional issue is separable from the merits of the case, the Court need only
 22 consider evidence related to the jurisdiction issue, and rule on that issue, resolving factual disputes as
 23 necessary. *Id.* (citing *Berardinelli v. Castle & Cooke, Inc.*, 587 F.2d 37 (9th Cir. 1978)).

24 In deciding a Rule 12(b)(1) motion that mounts a factual attack on jurisdiction, "no presumption
 25 of truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not
 26 preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the
 27 plaintiff will have the burden of proof that jurisdiction does in fact exist." *Mortensen v. First Fed. Sav.*
 28 *& Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977).

The Supreme Court has stated that *Younger* abstention “represents the sort of ‘threshold question’ [that] may be resolved before addressing jurisdiction.” *Tenet v. Doe*, 544 U.S. 1, 6 n. 4 (2005). However, numerous courts have also considered abstention arguments within the framework of a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *See D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004) (declaring “*Younger* abstention is jurisdictional”); *Miller Brewing Co. v. Ace U.S. Holdings, Inc.*, 391 F. Supp. 2d 735, 739 (E.D. Wisc. 2005) (“[A] motion to dismiss or stay based on an abstention doctrine raises the question of whether a court should exercise subject matter jurisdiction.”); *Beres v. Village of Huntley*, 824 F. Supp. 763, 766 (N.D. Ill. 1992) (a motion to dismiss for lack of subject matter jurisdiction “appears to be an appropriate method for raising the issue of abstention”).

DISCUSSION

Defendants have requested that this Court abstain pursuant to the doctrine set out in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. Under the *Younger* doctrine, absent extraordinary circumstances, a federal court should abstain from proceeding with a case if: (1) there is an on-going state court proceeding; (2) there is an important state interest at issue; and (3) there is an adequate opportunity for plaintiffs to litigate the federal claims in the state court proceeding. *See Younger*, 401 U.S. at 40 (criminal proceedings only); *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982) (outlining the three *Younger* criteria); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (extending *Younger* doctrine to civil proceedings). Defendants argue that abstention pursuant to *Younger* is appropriate because a similar complaint raising similar issues is ongoing in state court and the other two elements of *Younger* are met as well.

The circumstances here satisfy all three prongs of the *Younger* doctrine. As to the first *Younger* element, plaintiffs argue that there is no ongoing state court proceeding because the parties in the state court action are no longer the same parties involved in this action. When the state court action was first filed on February 20, 2007, it named seven individuals and the SFDSA as plaintiffs. Those seven individuals were also included as part of the thirty-five plaintiffs named in the federal complaint, filed five months after the initiation of the state court proceeding. However, two weeks after defendants

1 moved this court to abstain on *Younger* grounds, those seven individual plaintiffs withdrew as named
2 plaintiffs from the state court proceeding, leaving the SFDSA as the only plaintiff in state court.
3 Although plaintiffs correctly observe that the named parties in state court no longer contain any named
4 parties here, that observation does not alter the fact that those seven individuals, as deputies and
5 members of the SFDSA, remain members of the putative class in the pending state court class action
6 being brought by the SFDSA, its members, and others similarly situated. Thus, plaintiffs' contention
7 that the state court proceeding has been resolved as to those seven individuals because of their
8 successful request for dismissal is not wholly accurate.

9 The question becomes, then, whether the first *Younger* prong is satisfied where individual
10 members of a trade association seek to proceed in federal court when their organization is currently
11 litigating the matter on their behalf in state court. The Supreme Court has discussed this issue in the
12 broader context of whether the *Younger* doctrine applies to instances where a party in a federal action
13 shares similar interests as a different party in a state action. In *Steffel v. Thompson*, 415 U.S. 452
14 (1974), two men distributing pamphlets at a shopping center received warning that if they continued
15 distribution, they would be charged with trespassing. One of the men continued distributing the
16 handbills and was arrested and prosecuted. The other left the area, avoided arrest, and filed suit in
17 federal court seeking both declaratory and injunctive relief. Although the two men shared similar
18 interests, the Supreme Court held that the federal court erred by abstaining under *Younger* because the
19 federal plaintiff was not a party in the state court adjudication. *Id.* at 455-60. The Supreme Court
20 narrowed this holding, however, in *Hicks v. Miranda*, 422 U.S. 332 (1975), where the state seized from
21 a theater owner four copies of a film that a state court had declared obscene. Around the same time, the
22 state initiated criminal proceedings against two employees of the theater, but not against the theater
23 owner. The owner filed suit in federal court seeking the return of the seized films and a declaration that
24 the state obscenity statute was unconstitutional. The Court held that the ongoing state court proceedings
25 against his employees provided the owner the opportunity to adjudicate his constitutional issues such
26 that the lower court erred by not abstaining, despite the fact that the theater owner was not a party in any
27 state court action. *Id.* at 349. Later, in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Court reached
28 a similar conclusion as in *Steffel*, but stated that "there plainly may be some circumstances in which

1 legally distinct parties are so closely related that they should all be subject to the *Younger* considerations
2 which govern any one of them.” *Id.* at 928.

3 While the above cases discuss scenarios involving related parties, they do not directly confront
4 the situation in the present case where an organization is the plaintiff in the state court action and
5 members of that organization are the plaintiffs in the federal action. *See Cornwell v. Cal. Bd. of*
6 *Barbering and Cosmetology*, 962 F. Supp. 1260, 1269-70 (S.D. Cal. 1997) (“No courts appear to have
7 directly confronted this issue.”). However, Chief Justice Burger discussed this issue in a concurring and
8 dissenting opinion. *See Allee v. Medrano*, 416 U.S. 802, 830-31 (1974) (Burger, C.J., concurring in part
9 and dissenting in part). In *Allee*, state officials in Texas arrested and prosecuted union members for
10 violating state statutes while picketing. The union and several of its members brought suit in federal
11 court seeking injunctive relief and judgment that declared the state statutes unconstitutional. A three
12 judge district court panel, having heard the case before the Supreme Court’s decision in *Steffel* came
13 down, ruled in favor of the plaintiffs, declaring the statutes unconstitutional. The case reached the
14 Supreme Court after its decision in *Steffel* and, consistent with that opinion, the Court vacated and
15 remanded the district court’s ruling based in part on abstention issues. Chief Justice Burger advised the
16 lower court on the manner by which it should apply *Younger* when it heard the case on remand:

17 The union, to the extent that it has standing, will be seeking interference with state court
18 prosecutions of its members. There is an identity of interest between the union and its
19 prosecuted members; the union may seek relief only because of the prosecutions of its
20 members, and only by ensuring that such prosecutions cease may the union vindicate the
21 constitutional interests which it claims are violated. The union stands in the place of its
22 prosecuted members even as it asserts its own constitutional rights. The same comity
23 considerations apply whether the action is brought in the name of the individual arrested
24 union members or in the name of the union . . .

22 *Allee*, 416 U.S. at 830-31 (Burger, C.J., concurring in part and dissenting in part).

23 The Southern District of California applied Chief Justice Burger’s rationale to a similar scenario
24 involving two pending actions, one involving an organization in federal court and the other involving
25 two members of that organization in state court. *See Cornwell*, 962 F. Supp. at 1270. In *Cornwell*, Dr.
26 Cornwell, an African-American hair stylist, and the American Hairbraiders and Natural Hair Care
27 Association (“AHNHCA”) brought suit in federal court alleging various violations of both the federal
28 and California constitutions. Meanwhile, a hair salon and its owner, both belonging to the AHNHCA,

1 were involved in state court proceedings as a result of being cited and fined by the California Board of
 2 Barbering and Cosmetology. After applying *Younger* to the facts, the court allowed Dr. Cornwell to
 3 proceed with her action in federal court. However, guided by Chief Justice Burger's analysis in *Allee*,
 4 the court abstained under *Younger* in regard to AHNHCA. The court reasoned that:

5 [t]he problem with the current complaint is that the relief sought is really sought on
 6 behalf of all AHNHCA's members, not on behalf of AHNHCA itself . . . AHNHCA does
 7 not operate an African hair styling business; rather it is a trade association of African
 8 hair styling businesses. AHNHCA is actually seeking an injunction prohibiting
 9 enforcement of the [Barbering and Cosmetology Act] as applied to its members . . . As
 10 currently framed, the Court cannot grant plaintiffs the relief they seek because it would
 11 act to enjoin a pending state proceeding.

12 *Id.* at 1271. The court allowed plaintiffs forty-five days to file an amended complaint.

13 Although *Cornwell* is not authoritative, the Court finds its analysis persuasive and instructive.
 14 Much like the trade association in *Cornwell*, the SFDSA only has standing to bring an action in state
 15 court because of the alleged injuries to its members.³ It seeks relief in state court on behalf of all its
 16 members, which includes the thirty-five plaintiffs in this federal action, and not relief for the SFDSA
 17 itself. Five months after the SFDSA began its state court action, thirty-five individual members of the
 18 SFDSA brought this action in federal court seeking damages as a result of the same new staffing policy
 19 that forms the factual basis of the SFDSA's state complaint. Thus, although the thirty-five plaintiffs
 20 here are not named parties in the state court action, the SFDSA is currently litigating their interests in
 21 the pending state action and plaintiffs here stand ready to recover monetary awards from that action if
 22 the SFDSA is successful. A decision by this Court on the matter could interfere with the pending state
 23 court proceeding. *See New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491
 24 U.S. 350, 373 (1989) ("It is true, of course, that a federal court's disposition of such a case may well
 25 affect, or for practical purposes preempt, a future – or, as in the present circumstances, even a pending
 26 state court action."). Therefore, as to the first *Younger* element, there is an ongoing state court
 27 proceeding and the Court should abstain if the other two *Younger* requirements are met as well. *See*

28 ³The SFDSA has standing in state court to bring an action on behalf of its members challenging
 the staffing policy and seeking damages if: (1) the individual members would otherwise have standing
 to sue in their own right; (2) the interests being protected are relevant to the organization's purpose; and
 (3) the individual members are not required to participate in the lawsuit. *See Apartment Ass'n of Los
 Angeles County, Inc. v. City of Los Angeles*, 136 Cal. App. 4th 119, 129 (Cal. Ct. App. 2006).

1 *Beltran v. California*, 871 F.2d 777, 782 (9th Cir. 1988) (“*Younger* abstention requires that the federal
2 courts abstain when state court proceedings were ongoing at the time the federal action was filed.”).

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4 The second and third prongs of *Younger* are also satisfied here. As to the second *Younger*
5 element, the Supreme Court has held that administration of state criminal facilities and the protection
6 of employees from sexual discrimination are both important issues of state interest. *See Preiser v.*
7 *Rodriguez*, 411 U.S. 475, 491-92 (1973) (“Since these internal problems of state prisons involve issues
8 so peculiarly within state authority and expertise, the States have an important interest in not being
9 bypassed in the correction of those problems.”); *Ohio Civil Rights Comm. v. Dayton Christian Sch., Inc.*,
10 477 U.S. 619, 628 (1986) (“We have no doubt that the elimination of prohibited sex discrimination is
11 a sufficiently important state interest . . .”). As to the third prong of *Younger*, the court finds no reason
12 that plaintiffs cannot pursue all of the claims included in this lawsuit in state court. State courts are
13 courts of general jurisdiction and are able to adjudicate questions of federal law. *See Nevada v. Hicks*,
14 533 U.S. 353, 366-67 (2001). Thus, because the state court action began five months before this action,
15 plaintiffs had the opportunity to bring any issues of federal law, such as their claims under Title VII, in
16 the state court proceeding, and plaintiffs have failed to show otherwise. *See Hicks*, 422 U.S. at 349
17 (finding that the state court proceeding against a related party provided the federal plaintiff the
18 opportunity to raise his constitutional claims); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14-17
19 (1987) (finding that the burden rests on the federal plaintiff to show that state procedural law prevents
20 presentation of claims).

21 Having found that the *Younger* doctrine applies to the facts here, the Court must decide whether
22 to dismiss the action or stay the proceeding pending the outcome of the state court action. When
23 *Younger* applies and the federal party seeks injunctive relief, federal courts should dismiss the action
24 in its entirety. *See Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (“*Younger v. Harris* contemplates the
25 outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the
26 state courts.”); *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 816 n. 22 (1976) (“Where
27 a case is properly within [the *Younger*] category of cases, there is no discretion to grant injunctive
28 relief.”). “But when damages are sought and *Younger* principles apply, it makes sense for the federal

1 court to refrain from exercising jurisdiction *temporarily* by staying its hand until such time as the state
 2 proceeding is no longer pending.” *Gilbertson v. Albright*, 381 F.3d 965, 981 (9th Cir. 2004) (emphasis
 3 in original). Here, because *Younger* applies and plaintiffs seek damages along with injunctive relief,
 4 the Court stays the proceeding pending resolution of the state court action.⁴

6 CONCLUSION

7 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants’
 8 motion and STAYS plaintiffs’ claims pending the resolution of the state court action. **The parties are**
 9 **ordered to file joint reports on the status of the state court proceedings every 90 days until its**
 10 **resolution.**

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 12 **IT IS SO ORDERED.**

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 14 Dated: October 22, 2007



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 SUSAN ILLSTON
 United States District Judge

27 ⁴Defendants also move this Court to abstain based on *Colorado River* principles. Because the
 28 Court must abstain under *Younger*, it does not reach the matter of whether to also abstain under
Colorado River.